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IN THE

Supreme Court of the United States

OCTOBER TERM 1968

No. 657

SAN JACINTO SAND COMPANY, INC.,
Petitioner,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE 14TH SUPREME JUDICIAL DISTRICT OF TEXAS AT HOUSTON, TEXAS

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

San Jacinto Sand Company, Inc., petitioner herein, prays that a Writ of Certiorari be issued to the Court of Civil Appeals for the 14th Supreme Judicial District of Texas to review a judgment herein affirming the judgment of the District Court of Harris County, Texas, 157th Judicial District, and remand this case to the said Court of Civil Appeals with instructions that its judgment and the judgment of the trial court should be corrected to accord to the petitioner the protection of its property required by the Constitution of the United States and the Constitution of the State of Texas.

OPINIONS BELOW

The judgment of the 157th District Court of Harris County, Texas was set forth in a written judgment entered by the court. Thereafter the 157th District Court entered its Findings of Fact and Conclusions of Law in support of such judgment. The petitioner's Motion for New Trial was denied by the 157th District Court. The opinion of the Court of Civil Appeals for the 14th Supreme Judicial District of Texas in support of its judgment herein (R.-Opn), printed in Appendix A hereto, *infra* pages 1a-15a, is officially reported at 426 S.W. 2d 338. The order of the said Texas Court of Civil Appeals overruling petitioner's Motion for a Rehearing was entered without opinion. The order of the Supreme Court of Texas denying petitioner's Application for Writ of Error to the Court of Civil Appeals for the 14th Supreme Judicial District of Texas was entered with the docket notation, "Refused. No reversible error."* The order of the Supreme Court of Texas granting the petitioner's Motion to File a First Amendment to Application for Writ of Error was entered without opinion.* The order of the Supreme Court of Texas overruling petitioner's Motion for Rehearing of Application for Writ of Error and Application as Amended was entered without opinion.*

JURISDICTION

1. The order of the Supreme Court of Texas denying petitioner's Application for Writ of Error to the Court of Civil Appeals for the 14th Supreme Judicial District of Texas was entered July 10, 1968. The petitioner's Motion to Amend Application for Writ of Error to the Court of Civil Appeals for the 14th Supreme Judicial District was granted by the Supreme Court of Texas on July 24, 1968. The Supreme Court of Texas on July 24, 1968 denied the

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* Order of Supreme Court of Texas dated July 24, 1968.

Application for Writ of Error as Amended. The petitioner's Motion for Rehearing of Application for Writ of Error and Application as Amended were overruled by the Supreme Court of Texas on July 24, 1968.

2. Jurisdiction is conferred upon this Court by Title 28, United States Code, Section 1257(3):

(a) The action of the Supreme Court of Texas, the highest court of the State of Texas, in refusing petitioner's Application for Writ of Error to review and correct the errors of law committed by the Court of Civil Appeals for the 14th Supreme Judicial District in its judgment herein, of which review is hereby sought, was to constitute the said Civil Court of Appeals the highest court of the State of Texas in which a decision hearing could be had within the meaning of 28 U.S.C. 1257. *Michigan-Wisconsin Pipe Line Co.* v. *Calvert,* 347 U. S. 157, 98 L. Ed. 583, 74 S. Ct. 396 (1954). The date, however, when the judgment and decision of the Court of Civil Appeals became final was July 24, 1968, when the Supreme Court of Texas overruled Petitioner's Motion for Rehearing on Application for Writ of Error, as amended. *American Railway Express Company* v. *Levee,* 263 U. S. 19, 168 L. Ed. 140, 44 S. Ct. 11 (1923); *Adam* v. *Saenger,* 303 U. S. 59, 82 L. Ed. 649, 58 S. Ct. 454 (1938).

(b) The judgment of the Court of Civil Appeals for the 14th Supreme Judicial District of Texas, of which review is hereby sought, is a "Judgment or decree within the meaning and contemplation of 28 U.S.C. 1257" *Radio Station WOW* v. *Johnson,* 326 U. S. 120, 89 L. Ed. 2092, 65 S. Ct. 1475 (1945); *Pope* v. *Atlantic Coast Line R. Co.,* 345 U. S. 379, 97 L. Ed. 1094, 73 S. Ct. 749 (1953).

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent federal constitutional provision involved in this case is Amendment Fourteen, Section 1, of the Constitution of the United States, U.S.C.A. Const. Amdmt. XIV, Sec. 1:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The pertinent provisions of the Constitution of the State of Texas involved in this case are: Article 1, Section 17 and Section 19 of the Constitution of the State of Texas:

> "§17. Taking, damaging or destroying property for public use; special privileges and immunities; control of privileges and franchises
>
> "Sec. 17. No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person; and, when taken, except for the use of the State, such compensation shall be first made, or secured by a deposit of money; . . ."
>
> "§19. Deprivation of life, liberty, etc.; due course of law
>
> "Sec. 19. No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land."

QUESTIONS PRESENTED

The petitioner, as the owner of a 17.584 acre tract, and the respondent, as the holder of two easements located on such tract, disagreed as to whether the respondent's easements were entitled to lateral support and if the easements were entitled to lateral support, whether the obligation to provide lateral support included an obligation to protect the easements from the erosive action of the San Jacinto River?

In its affirmation of the trial court's declaratory judgment, which provided that the respondent's easements must be provided with lateral support and protected from the erosive action of the San Jacinto River, the Court of Appeals stated, "None of the appellant's (petitioner's) due process or other constitutional rights have been violated in this case." (Appendix A, p. 15a); and "The problems in this case are difficult, for to grant adequate relief to appellee (respondent) the appellant (petitioner) must suffer loss and damage, and its rights to excavate valuable sand and gravel from its land must be reduced." (Appendix A, p. 13a).

The issues here presented are whether in affirming the trial court's determination of the correlative rights of the parties, the Court of Appeals applied principles of law which are constitutionally deficient within the meaning of Section 1 of the Fourteenth Amendment to the Constitution of the United States and Sections 17 and 19 of Article 1 of the Constitution of the State of Texas? In particular:

1. Did the Court of Appeals deprive the petitioner of its constitutional right to be compensated for 314,370 cu. yds. of sand and gravel taken from it, when the Court of Appeals did not reverse and remand the case to the trial court with instructions that the judgment entered by the

trial court in this declaratory judgment proceeding was excessive and could not be sustained unless through eminent domain proceedings that could be instituted by the respondent with leave of the trial court or a monetary award made by the trial court, the judgment was modified to assure the payment to the petitioner of fair compensation for the 314,370 cu. yds. of sand and gravel taken from the petitioner when the trial court imposed upon the petitioner, as the landowner, the absolute burden of supporting the respondent's easements and protecting them from the erosive action of the San Jacinto River, which protection was given by the entry of a permanent injunction that:

(a) Prohibited any excavation by the petitioner in a 200 ft. x 399 ft. strip of land paralleling the east bank of the San Jacinto River; and

(b) Limited the petitioner's excavations in two 500 ft. strips on the south side of the respondent's easements by requiring the creation of residual slopes of repose in excess of 1 ft. vertical to 3 ft. horizontal, which is the slope of repose which the trial court found would be stable when all factors other than the action of the river were taken into account, namely the imposition of a residual slope requirement of 1 ft. vertical to 10 ft. horizontal in one 500 ft. strip and 1 ft. vertical to 5 ft. horizontal in another 500 ft. strip?

2. Was the petitioner unconstitutionally deprived of the equal protection of the common law of Texas when the Courts of Texas declined to follow the rule of *Williams* v. *Thompson,* 152 Tex. 270, 256 S.W. 2d 399 (Tex. 1953) which provides that the doctrine of lateral support cannot be used to compel an easement owner to provide lateral support for the owner's land that abuts the easement land?

3. Did the Court of Appeals deny the petitioner due process of law and equal protection of the laws of the State of Texas when it held that the petitioner had not pleaded the issue of the respondent's abandonment of a portion of its easements, that the abandonment issue had not been tried by express or implied consent of the parties and the issue of abandonment was deemed to have been waived, even though the record shows that (a) the respondent by trial amendment placed in issue the *present location* of its easement, (b) the trial court's attention was invited to the abandonment issue by the petitioner's motion for judgment which was filed prior to the entry by the court of its final judgment, and (c) during oral argument on the motion for judgment the trial court's attention was invited to the evidence (respondent's documentary records and the testimony of the respondent's engineer) which clearly revealed that an abandonment of portions of the easements had been intended and that the abandonment had occurred.

4. Did the Court of Appeals unconstitutionally deprive the petitioner of due process of the law when, instead of reversing and remanding to the trial court for appropriate findings as to what the respondent's engineer meant when he said that the respondent had "abandoned its old pipe in place", the Court of Appeals resolved the uncertainty by assuming that the evidence could only be favorable to the respondent and said "The Toll Engineer *obviously* meant only that the old pipes which had been laid pursuant to the easements and which were replaced by a new pipe, were left in the ground because there was no point in taking them out." (emphasis supplied)

STATEMENT OF THE CASE

The petitioner's dredging activities on its 17.584 acre tract of land have been permanently "shut down" pursuant to injunctive relief granted the respondent. Injunctive relief was granted to the respondent to assure that lateral support would be provided for the respondent's three underground intercity cables located on the tract.

The trial court found the following facts in respect to lateral support of the respondent's easements:

> "27. The nature of the soil on the 17.584 acre tract is such that its stable slope of repose is approximately 3 to 1; i.e., 3 feet of slope for each one foot of depth. This would take into account the presence of water, and the rising or falling of the river level but would not take into account the effect of river action or velocity of the current of the San Jacinto River on this soil. . . ."
>
> "29. The flow and velocity of the San Jacinto River must be taken into account in determining the effect of dredging operations and excavations on either side of the 30 foot strip within which Southwestern Bell Telephone's easements are located. The force of the flow of the river is directed against the east bank of the San Jacinto River at the point in question. The western boundary of Plaintiff's easement begins at the eastern bank of the San Jacinto River where the general erosive effect of the flow of the San Jacinto River is the greatest."

The trial court entered an order that:

(a) Permanently enjoined[1] the petitioner from conducting any excavations in a 200 ft. strip of land paralleling the east bank of the San Jacinto River;

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[1] The injunction has the collateral effect of making it impossible to recover the sand and gravel located north of the boundary in the most commercially marketable manner, i.e. dredging.

(b) Limited the petitioner's excavations in two 500 ft. strips by prescribing the maintenance of residual excavation slopes of repose in excess of 1 vertical to 3 horizontal, namely on the north side of the easements petitioner was ordered to leave the following residual slopes of repose:

Strip Distance from east bank of San Jacinto River	Slope of repose
200 ft. - 700 ft.	1 vertical 10 horizontal
700 ft. - 1200 ft.	1 vertical 5 horizontal

Land containing 314,370 cu. yds. of sand and gravel ("erosion protection land") was taken from the petitioner when the trial court imposed upon the petitioner the obligation of protecting the easements from erosion by the San Jacinto River. The location and value of the sand and gravel taken from the petitioner is shown in the attached Appendix B and is summarized below:

Area in which sand and gravel taken	Yardage taken	Value of sand taken	
		Retail Price $1.35 yd.	Royalty Price 15¢ yd.
		$	$
Area north of easements.....	180,570[2]	243,769	27,086
Area south of easements.....	133,800	180,630	220,070
	314,370	424,399	47,156

The respondent installed its original 27 quad. 19 gauge Beaumont-Houston A and B cables ("A & B Cables") on its first easement in 1946. The respondent installed its original 51 pair 19 guage Crosby-Houston cables ("Crosby Cables") on its second easement in 1954, which easement was 10 ft. north of the first easement. In 1966 in connection

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[2] Includes 159,900 yards to which access by dredge has been denied the petitioner by the injunction which prohibits excavations in the 200 ft. x 300 ft. strip.

with its completion of a new submarine crossing under the San Jacinto River, the respondent installed in the 10 ft. strip between its cables 197 ft. of larger cables and 180 ft. of protective 12 inch pipe and then connected the new and larger cables into the existing A & B Cables and Crosby Cables at a manhole which it also installed in the 10 ft. strip. The respondent then abandoned in place that portion of the A & B Cables and Crosby Cables (197 ft.) and the original protective 8 inch pipe located between the east bank of the San Jacinto River and its newly constructed manhole.

Although advised by its outside consulting engineers to protect its cables from the erosive action of the San Jacinto River by acquiring the portion of the 17.584 acre trust adjacent to the San Jacinto River by purchase or condemnation, the respondent declined to do so.

Drawings prepared under the direction of the respondent's Toll Engineer showed the respondent's intention to abandon the old pipe and cables. Two of these drawings were furnished to the U. S. Corps of Engineers (R. — S.F. Pltf. Exs. 15, 16). Two of the drawings were used in the respondent's internal operations (R. — S.F., Defd. Exs. 3, pp. 21, 29).

The trial court judge, in ruling on the petitioner's Motion for Judgment which set forth the abandonment issue, stated as follows:

> "THE COURT: Well, I find for the Plaintiff with respect to the matter of abandonment; also with respect to the matter of Plaintiff's being entitled to have covering over the conduit."

The petitioner raised the constitutional questions here involved in its: (1) Motion for New Trial; (2) Brief for Appellant filed in the Court of Civil Appeals; (3) Applica-

tion for Writ of Error to the Supreme Court of Texas; (4) and First Amendment to the Application for Writ of Error filed with the Supreme Court of Texas. The questions actually placed before the respective courts are compiled in the summary attached hereto as Appendix C.

REASONS FOR GRANTING THE WRIT

A declaratory judgment proceeding has been converted into a proceeding in the nature of an eminent domain proceeding whereby 314,370 cu. yds. of sand and gravel have been taken from the petitioner through state action without compensating the petitioner. The taking of the sand and gravel without the payment of compensation violates Sections 17 and 19 of Article 1 of the Constitution of the State of Texas, and Section 1 of the Fourteenth Amendment to the Constitution of the United States. In taking the sand and gravel the petitioner was denied equal protection of the common law of the State of Texas and due process of law.

I.

A DECLARATORY JUDGMENT PROCEEDING WHICH IS SUI GENERIS CANNOT BE USED TO SUBVERT THE CONSTITUTIONAL LIMITATIONS ON THE TAKING OF PRIVATELY OWNED LAND WITHOUT THE PAYMENT OF COMPENSATION

After determining that the respondent's easements would be supported in their natural state if the petitioner was required to excavate on the 17.584 acre tract in such a way as to leave residual excavation slopes of 1 ft. vertical to 3 ft. horizontal, the court, without providing for the payment of compensation to the petitioner, took the erosion

protection land containing 314,370[3] cu. yds. of sand and gravel from the petitioner in order to protect the respondent's easements from erosion by the San Jacinto River, such additional land being shown on the sketches that appear on page 17a of Appendix B.

The judgment of the trial court was constitutionally deficient because of its excessiveness, that is it allowed the taking of the erosion protection land containing 314,370 cu. yds. of the petitioner's sand and gravel without compensating the petitioner for such sand and gravel. The obligation to provide lateral support does not include the obligation to protect the respondent's easements from the erosive action of the San Jacinto River. The common law obligation to provide lateral support involves the supporting of adjoining land in its *"natural state without improvements"*. *Northern Transportation Company* v. *Chicago,* 99 U.S. 635, 25 L. ed. 336, (1897). *Simon* v. *Nance,* 100 S.W. 1039 (Tex. Civ. App. 1907, no writ hist.).

In *Northern Transportation Company* v. *City of Chicago, supra,* the doctrine of lateral support was described as follows at page 339:

> ". . . The general rule may be admitted that every landowner has a right to have his land preserved unbroken, and that an adjoining owner excavating on his

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[3] The erosion protection land containing the 314,370 cu. yds. of sand and gravel represents the sand and gravel located above lateral support slopes of 1 ft. vertical to 3 ft. horizontal in the 200 ft. x 399 ft. strip paralleling the San Jacinto River; in the two 500 ft. strips south of the respondent's easements in which the court established excavation slopes in excess of 1 ft. vertical to 3 ft. horizontal; and in the area north of the respondent's easements and east of the 200 ft. x 399 ft. strip where excavation by dredging, the only commercially feasible method of excavation, is prohibited because access to the land through the 200 ft. x 399 ft. strip has been permanently denied to marine dredges and barges.

> own land is subject to this restriction, that he must not remove the earth so near to the land of his neighbor that his neighbor's soil will crumble away under its own weight and fall upon his land. *But this right of lateral support extends only to the soil in its natural condition.*" . . . (emphasis supplied)

In *Simon* v. *Nance, supra,* the doctrine of lateral support was described as follows at page 1040:

> ". . . By the weight of authority it is a well-settled rule of the common law that an owner of land has an absolute right to the lateral support of adjoining land. In other words, he has the *right to have his land remain as it was in a state of nature,* and neither the adjoining landowner, nor any one else, can rightfully remove from the boundaries of the land the supports *which hold it in its natural position. . . .*" (emphasis supplied)

The trial court cannot by judicial fiat enlarge the common law doctrine of lateral support to include the protecting of the respondent's easements from erosion.

A declaratory judgment proceeding in Texas is neither legal nor equitable, it is sui generis. *Cobb* v. *Harrington,* 144 Tex. 360 190 S.W. 2d 709 (Tex. 1945). The taking of the erosion protection land containing the 314,370 cu. yds. of sand and gravel was an excessive act.

In light of the respondent's status as a public utility, the petitioner concedes that the court in the public interest could properly have granted the respondent the right to reopen the case and institute an eminent domain procedure pursuant to which the petitioner would be paid the fair value of the land taken from it, or in the alternative the court could continue the temporary restraining order in effect for a reasonable time to allow the respondent to physically relocate or remove its cables from the easement area or to arrange to provide the easements and the cables

contained therein with appropriate protection from the erosive action of the San Jacinto River.

The powers conferred upon the courts of Texas do not include the right to take from the petitioner the 314,370 cu. yds. of sand and gravel without arranging for the payment of fair compensation to the petitioner. *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393, 67 L. ed. 322, 43 S. Ct. 158 (1922).

The respondent should not be allowed to subvert the petitioner's constitutional right to be compensated for the taking of the erosion protection land by resort to an invalid argument about lateral support of easements.

II.

THE PETITIONER IS ENTITLED TO THE PROTECTION OF THE RULE IN WILLIAMS v. THOMPSON, 256 S.W. 2d 399 (TEX. 1953) WHICH DENIES TO A LANDOWNER THE RIGHT TO COMPEL AN EASEMENT HOLDER TO PROVIDE LATERAL SUPPORT FOR THE LANDOWNER'S LAND WHICH ABUTS ON THE EASEMENT LAND

The imposition upon the petitioner of the obligation of providing lateral support of any kind for the respondent's easements unconstitutionally deprives the petitioner of the equal protection of the laws of the State of Texas. In *Williams* v. *Thompson,* 152 Tex. 270, 256 S.W. 2d 399 (Tex. 1953), the Supreme Court of Texas held that the common law doctrine of lateral support was not applicable to the relationship that existed between easement holders and landowners. The court declined to require the holder of a roadway easement to provide lateral support for the landowner's land which abutted the easement holder's roadway. The court said at page 403:

"There are many American and English decisions on the doctrine of lateral support. . . . It is undoubtedly the rule in this state as well as in most other jurisdictions that each of two adjoining landowners is entitled to the lateral support of the other's land; this right is one of property necessarily and naturally attached to and passing with the soil. 1 Thompson on Real Property, Sec. 545, p. 654, citing Simon v. Nance, 45 Tex. Civ. App. 480, 100 S.W. 1038, which described the right as 'absolute'.

"*But as petitioners recognize in their argument, the parties to this suit are not adjoining landowners.* What we have is a respondent who is one of several owners of an easement in Hidden Road and petitioners who are owners not only of the adjoining land but of the fee title to the 15 feet of Hidden Road which respondent was improving when he destroyed the lateral support to petitioners' adjoining land." (emphasis supplied)

The Court of Appeals' affirmation of the trial court's judgment unconstitutionally deprived the petitioner of the protection of the common law of Texas as exemplified by the rule of *Williams* v. *Thompson, supra.* In applying the rule of *Erie R. Co.* v. *Tompkins,* 304 U.S. 64, 82 L. ed. 1188, 58 S. Ct. 817 (1938) it is clear that the common law rules enunciated by state courts in judicial opinions are to be regarded as a part of the law of the state. The action of the Court of Appeals in declining to apply the rule of *Williams* v. *Thompson, supra,* to the instant case constituted a denial to the petitioner of the equal protection of the laws of the State of Texas. *Shelley* v. *Kraemer,* 334 U.S. 1, 92 L. ed. 1161, 68 S.C. 836 (1948); *American Federation of Labor* v. *Swing,* 312 U.S. 321, 85 L. ed. 855, 61 S. Ct. 568 (1941); *Cantwell* v. *Connecticut,* 310 U.S. 296, 84 L. ed. 1213, 60 S. Ct. 900 (1940); *Bridges* v. *California,* 314 U.S. 252, 86 L. ed. 192, 62 S. Ct. 190 (1941); *Chicago,*

B. & Q. R. Co. v. *Chicago,* 166 U.S. 226, 41 L. ed. 979, 17 S. Ct. 581 (1897).

III.

THE PETITIONER IS DENIED DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW WHEN A MOTION FOR JUDGMENT WHICH RAISES AN ABANDONMENT ISSUE IS NOT TREATED AS AN AMENDMENT TO THE PETITIONER'S PLEADINGS OR AS A PROPER BASIS FOR NEW TRIAL

A judgment is not entered in a declaratory judgment proceeding until it has been signed by the trial judge. *Freeport Motor Casualty Co.* v. *Tharp,* 406 Ill. 295 94 N.E. 2d 139 (Ill. 1950). A declaratory judgment proceeding is sui generis. *Cobb* v. *Harrington,* 144 Tex. 360 190 S.W. 2d 709 (Tex. 1945).

The respondent at the commencement of the case filed a trial amendment to the prayer to its petition placing in issue the present location of the respondent's easements. The respondent's Toll Engineer testified that the respondent had abandoned 197 ft. of its old pipes and cables in place. The documentary records of the respondent produced at the trial showed the clear intention on the part of the respondent to abandon the easements. These facts were called to the trial judge's attention in the petitioner's motion for judgment and oral argument thereon prior to his signing of the final judgment.

The petitioner was unconstitutionally denied due process of the law and equal protection of the law when in light of the respondent's trial amendment, the testimony and documentary records of the respondent and the timely filing of the petitioner's motion, the Court of Appeals determined that the abandonment issue had not been pleaded in a manner that satisfied the requirements of Rule 94 of the

Texas Rules of Civil Procedure[4] and was accordingly waived, and that the issue of abandonment had not been tried by express or implied consent in a manner that satisfied the requirements of Rule 67 of the Texas Rules of Civil Procedure.[5]

This case was commenced and concluded by an invocation of the trial court's equity powers to grant injunctive relief. The nature of the declaratory remedy imposed upon the courts of Texas the obligation to exercise their discretion in a manner to do equity and justice to the parties. The petitioner was denied due process of law and equal protection of the laws of Texas when the courts failed to exercise such discretion.

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[4] Rule 94 of the Texas Rules of Civil Procedure provides as follows:

"Rule 94. Affirmative Defenses

"In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consolidation, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. . . ."

[5] Rule 67 of the Texas Rules of Civil Procedure provides as follows:

"Rule 67. Amendments to Conform to Issues Tried Without Objection

"When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. In such case such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made by leave of court upon motion of any party at any time up to the submission of the case to the Court or jury, but failure so to amend shall not affect the result of the trial of these issues; provided that written pleadings, before the time of submission, shall be necessary to the submission of special issues, as is provided in Rules 277 and 279. Amended by Order of March 31, 1941."

IV.

THE COURT OF APPEALS DENIED THE PETITIONER DUE PROCESS OF THE LAW WHEN IT PRESUMED THAT THE RESPONDENT'S TOLL ENGINEER'S UNEQUIVOCAL TESTIMONY AS TO THE ABANDONMENT IN PLACE OF THE RESPONDENT'S PIPES AND CABLES DID NOT MEAN THAT THE RESPONDENT HAD NOT ABANDONED ITS EASEMENTS

The respondent's Toll Engineer testified that the respondent had abandoned in place portions of its original pipes and cables. The construction sketch and submarine crossing sketches prepared by the respondent's personnel showed the respondent's intention to abandon in place portions of its original pipe and cables (R-S.F., Defd.'s Ex. 3, p. 21, 29; Pltf.'s Exs. 14, 15) The Court of Appeals in considering the abandonment question stated (Appendix A, p. 10a):

> "... The Toll Engineer obviously meant only that the old pipes, which had been laid pursuant to the easements and which were replaced by a new pipe were left in the ground, because there was no point in taking them out. This does not mean that the easements were abandoned, especially when a new line had been laid between the old pipes at the same time. It is necessary to prove an intent to abandon in order for there to be an abandonment of an easement, and the evidence must be satisfied by clear and satisfactory evidence. . . ."

The Court of Appeals denied the petitioner due process of the law and the equal protection of Rule 299 of the Texas

Rules of Civil Procedure[6] when in the presence of evidence showing an intention on the part of the respondent to abandon the easements, the Court presumed that the Toll Engineer could not have meant that an abandonment had occurred. The presumption by the Court of Appeals of what the witness meant violated the petitioner's right to a trial of the issue of abandonment and thus deprived the petitioner of property without compensation. The Court of Appeals, as an instrument of the State, cannot presume a fact and deprive the petitioner of the right to due process of law and the right to be compensated for its property. "The power to create presumption is not a means of escape from constitutional restrictions." *Bailey* v. *Alabama,* 219 U.S. 219, 239, 55 L. ed. 191, 31 S. Ct. 145 (1911).

CONCLUSION

This case presents the interrelated constitutional questions of how a declaratory judgment proceeding can be converted into a procedure in the nature of an eminent domain proceeding whereby the petitioner's land (314,370 cu. yds. of sand and gravel) can be taken without according the petitioner the equal protection of the common law of Texas, without the payment of compensation to the petitioner and without affording the petitioner due process

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[6] Rule 299 of the Texas Rules of Civil Procedure provides as follows:

"Rule 299. Omitted Findings

"Where findings of fact are filed by the trial court they shall form the basis of the judgment upon all grounds of recovery and of defense embraced therein. The judgment may not be supported upon appeal by a presumption of finding upon any ground of recovery or defense, no element of which has been found by the trial court; but where one or more elements thereof have been found by the trial court, omitted unrequested elements, where supported by evidence, will be supplied by presumption in support of the judgment. Refusal of the court to make a findings requested shall be reviewable on appeal."

of the law. The constitutional transgressions involved in this case were justified by the Court of Appeals by the invocation of two overriding constitutionally deficient principles namely that (1) the petitioner's land can be taken without compensation if the protection of the respondent's land from erosion would be *"prohibitive and not feasible because of cost, maintenance and loss of time"* (Appendix A, p. 6a); and (2) the integrity of thousands of Texas easements must be protected without regard to the rights of the petitioner as a landowner. (Appendix A, p. 13a)

The interrelated constitutional questions presented in this case satisfy the most stringent standards of discretionary review of this Honorable Court.

Wherefore your petitioner respectfully submits that Writ of Certiorari should issue to the end that this Court may review the decision of the Civil Court of Appeals for the Fourteenth Supreme Judicial District of Texas to determine the propriety of its resolution of the constitutional questions involved and raised herein.

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APPENDIX A

Affirmed, and opinion filed March 6, 1968.

No. 81

SAN JACINTO SAND COMPANY, INC., APPELLANT

v.

SOUTHWESTERN BELL TELEPHONE COMPANY, APPELLEE

Appeal from District Court of Harris County

Appellee, Southwestern Bell Telephone Company (Southwestern Bell), as plaintiff, brought suit against defendant, San Jacinto Sand Company, Inc. (Sand Company) and others as defendants, seeking a temporary injunction to prohibit defendants from making excavations which allegedly would result in the destruction of the cables, conduits, and equipment of Southwestern Bell, and further seeking a declaration of its rights as an alleged easement owner to lateral and/or subjacent support. During the hearing on appellee's application for temporary injunction, on November 29, 1966, all parties jointly moved to consolidate for all purposes the hearing on application for temporary injunction and the hearing of the cause on the merits.

The hearing on the application for temporary injunction and on the declaratory judgment was tried without a jury, and at the conclusion of the testimony after some delay, on May 22, 1967, the trial court granted appellee's application for temporary injunction and held that Southwestern Bell, as owner of two easements burdening a tract of land owned by Sand Company, was entitled to the reasonable enjoyment and use of its easements, and was entitled to exercise the rights, privileges and authorities granted thereby without interference, damage or destruction by

removal of the lateral and subjacent support of the easements through excavation of the sand, gravel and soil on the servient tract owned by the Sand Company.

This appeal has been perfected from the trial court's final judgment by San Jacinto Sand Company, Inc., as appellant. Southwestern Bell Telephone Company is appellee.

Appellant, Sand Company, is a Texas corporation doing business in Harris County and is engaged in the excavation and sale of sand and gravel. Appellee, Southwestern Bell, is a telephone company and public utility serving telephone customers in the Beaumont-Houston area and areas throughout and beyond the State of Texas. Appellant owns a certain 17.584 acre tract of land in Harris County, Texas, adjoining and east of the San Jacinto River, said property having been conveyed to appellant by deed from Sherwood E. Beverly, dated January 20, 1966, and duly recorded in the deed records of Harris County. In 1945 and 1954, two easements were executed by the then owners of the land to Southwestern Bell. Each easement specifically located the telephone lines across the property, the 1954 easement providing *that the lines should* extend approximately 10 feet north of and parallel with the 1945 easement lines. The easements provided that Southwestern Bell was granted the "right, privilege and authority to construct, reconstruct, operate, maintain, *or remove* lines of telephone and telegraph, or other signal or communication circuits, consisting of underground conduits, cables, manholes, markers and fixtures *as the grantee may from time to time require,* (with the right to cut down and keep cut down trees, brush, and stumps within ten feet of each side of said lines), on and under the property. . . .", and that the conduits and cables were required to be buried to such depth as not to interfere

with the ordinary cultivation of the land. Pursuant to the easement granted in 1945, Southwestern Bell installed in 1945 and 1946, certain equipment including underground intercity toll cables referred to as the Houston-Beaumont A and B cables. Pursuant to the 1954 easement, appellee installed in 1954, underground inter-city toll cables, referred to as the Crosby-Houston cables. The lines extend from the east bank of the San Jacinto River in an easterly direction and then generally in a north-northeasterly direction to the north property line of the 17.584 acre tract. The easements were referred to during trial as a 30-foot easement or easements to describe the 30-foot wide area used by appellee in the repair, operation, maintenance, etc., of its equipment, though by stipulation, reference to the 30-foot area was used by the parties as an identification device. The cables have not been replaced since they were originally installed except at the river crossing. Appellant, Sand Company, also owns a tract of land of about 20.099 acres located immediately adjacent to and south of the 17.584 tract and has extensively excavated sand and gravel from the surface of the 20.099 acre tract. Waters of the San Jacinto River have filled the excavations on that tract. Appellant and others were excavating and removing sand and gravel from the 20.099 acre tract for some time prior to the filing of this action.

The title of Sand Company to the 17.584 acre tract and the title to the two easements of Southwestern Bell derive from a common grantor, and appellant's chain of title clearly reflects the existence of appellee's easements, which were duly recorded. Sand Company acquired title to the 17.584 acre tract with actual knowledge that the tract was burdened with the two easements, and with actual knowledge that appellee had installed its cables and conduits pursuant to such easements.

The trial court found that the operation and maintenance of the conduits, cables, etc., have reasonably required the use of a ten-foot area on each side of the cables. Since the second easement is located ten feet north of the first easement, there is an overlap in the area used, and Southwestern Bell has utilized a strip approximately thirty feet in width for the entire length of the easements. In 1966, appellee began construction of a new river crossing under the San Jacinto River. The Houston-Beaumont A and B cables and the Crosby-Houston cable were connected to the new river crossing at a distance of approximately 192-197 feet east of the east bank of the San Jacinto River on the 17.584 acre tract. The new crossing consists of a 12-inch concrete coated pipe, which enters the east bank of the San Jacinto River at a point located between the two 8-inch steel pipes in which the Houston-Beaumont A and B cables and the Crosby-Houston cable had been installed. The 12-inch pipe terminates at a manhole at the 192-197 foot point on appellant's land, where the existing 27 quad, 19 gauge Houston-Beaumont A and B cables and the Crosby-Houston 51 pair, 19 gauge cable were brought into the manhole on the 17.584 acre tract and spliced into the three 37 quad, 19 gauge cables. The two 8-inch pipes from that poi[illegible]d to the river were thereby rendered useless. Th[illegible] an integral part of the communication syst[illegible]ouston and the area of Beaumont, Port Arthur and Orange. In addition, the cables involve high priority government circuits, press circuits, radio broadcast circuits, high-flying dispatch circuits, aviation control circuits and foreign exchange circuits.

The composition of the surface of the 17.584 acre tract is largely common sand and gravel. Certain areas of the tract contain deposits of sand and gravel at least to the extent of 15 to 30 feet below the surface, and appellant

claims that there are deposits of sand in commercially marketable quantities extending to a depth of about 60 feet. Beginning about November, 1966, appellant prepared the surface of the 17.584 acre tract for excavation. Soon thereafter, the Sand Company began dragline excavations to the north and to the south of appellee's easements and the cables and conduits placed pursuant to the easements. Excavation of the 17.584 acre tract was discontinued as the result of a temporary restraining order obtained by appellee. Appellant stipulated that it did not intend directly to extract any sand from beneath the easements of appellee, and accordingly it stated that excavation operations would not be conducted within the 30-foot strip extending from the east bank of the San Jacinto River in a generally eastern direction for approximately 1,747 feet and then in a generally northeastern direction to the northern boundary of the tract.

In the course of the trial, hydraulic, soil and structural engineers testified, and the trial court found, that prosecution of appellant's plan of development would destroy the lateral and subjacent support of appellee's easements and the destruction of the cables, conduits, manholes, etc., placed pursuant thereto. The natural ground surface of the 17.584 acre tract is about 15 to 18 feet above the surface level of the water flowing in the San Jacinto River. The trial court further found that if excavations proceeded on either side of the 30-foot easement strip, the strip would deteriorate, and that if there were dredging operations to a depth of 60 feet on either side of the easement, the surface land would disappear, and deterioration would begin long before a 60-foot depth is reached. The trial court found from the evidence that alternatives would be impracticable, such as rerouting of appellee's lines, installation of aerial crossings, use of steel sheet piling bulkheads on either

side of the easements, etc., and though technologically possible, such alternatives would be prohibitive and not feasible because of cost, maintenance, and loss of time.

In order to provide lateral and subjacent support for Southwestern Bell's easements, the trial court decreed that the entire natural east bank of the San Jacinto River, along the west boundary of the 17.584 acre may not be further disturbed, and that no excavation may be made east of the east bank of the river for a distance of 200 feet; that no excavation may be made on land which forms the easements, the 30-foot strip. South of the easements at a point 200 feet east of the river and extending east 500 feet from that point, a stable residual slope of 3 horizontal to 1 vertical measured from natural ground level at the south easement line to mean sea level (river surface) and a residual slope of 10 horizontal to 1 vertical from mean sea level to the depth of the excavation below mean sea level was allowed. Parallel to the east river bank 200 feet back, 3 to 1 slope to mean sea level and a slope of 5 to 1 from mean sea level to depth of the excavation below mean sea level was ordered. For the remainder of the tract a 3 to 1 slope was permitted. North of the easement line a 3 to 1 slope was ordered 200 feet east of the river extending easterly throughout the tract and 200 feet from the river. The trial court further ordered that supplemental equitable relief may be provided by the court from time to time on application of any party.

Appellant attacks the judgment of the trial court by twenty-one points of error. By points five, six and seven, appellant contends that appellee is trespassing upon the 17.584 acre tract from a point approximately 197 feet back westerly to the San Jacinto River, and that appellee has abandoned the two 8-inch lines for that distance and has replaced the old lines with the new 12-inch pipe up

to the manhole constructed in 1966, which lies between the two 8-inch pipes above referred to. While appellee, Southwestern Bell, did relocate and remove its line by placing a 12-inch pipe between the two 8-inch pipes for a distance of 197 feet, no greater burden on the servient estate was imposed by such change. *Cantu* v. *Central Power & Light Co.*, 38 S.W. 2d 876 (Tex. Civ. App.), writ ref. The original 8-inch lines were parallel lines approximately eight to ten feet apart, and the discontinuance of use of the old lines by replacement with the 12-inch line lessened the burden upon the servient estate owned by appellant. Fort Quitman Land Co. v. Mier, 211 S.W. 2d 340, 343 (Tex. Civ. App.), writ ref., n.r.e.; 2 Thompson on Real Property (Replacement Ed., 1961), Sec. 426, p. 694; 21 Tex. Jur. 2d 175; 28 C.J.S., p. 777; Shammel v. Vogl, 396 P.2d 103 (Montana Sup.); Burris v. Peoples Ditch Co., 37 P. 922 (Calif. Sup.).

Appellant claims that the 1966 installation amounted to an expansion of Southwestern Bell's easement rights. The existence of an unauthorized expansion of easements turns on a proper construction of the written agreement of the parties. See Houston Pipe Line Co. v. Dwyer, 374 S.W. 2d 662, 664 (Tex. Sup.). As stated above, each of appellee's easements provides, in part, that the easement carries with it the,

> "right, privilege, and authority to construct, reconstruct, operate, maintain, repair, or *remove* . . . conduits, cables, manholes, markers and fixtures *as the grantee may from time to time require.*" (Emphasis added)

The principal decisions relied upon by appellant are the Dwyer case, supra, and Winslow v. City of Vallejo, 84 P. 191 (Calif. Sup. 1906), the latter case being cited as authority in the Dwyer opinion. In Dwyer, plaintiff sought

a judgment declaring that a pipeline easement terminated as a result of defendant having removed an 18-inch low pressure pipeline and replacing it with a 30-inch high pressure pipeline. Defendant answered that its easement right had not terminated and in the alternative, sought to condemn a right-of-way and easement. The agreement creating the easement contained no specification as to the size of the pipeline. It provided that the pipeline company had "A right of way to lay, maintain, operate, repair, and remove a Pipe Line for transportation of gas." The parties struck out the word "remove" and also deleted a paragraph that gave the pipeline company the right to construct additional pipelines. Additionally, they provided that the pipeline company would have the authority to remove the pipeline on termination of the easement. Stating that a proper determination of the case turns on a construction of the agreement between the parties, the Texas Supreme Court held:

> (1) "(T)hat the terms 'operate' and 'maintain' in the granting clause are at least broad enough to include the right to remove and replace the original pipe with pipe of the same size when necessary.
>
> (2) That unlike the situation that existed in Knox v. Pioneer Nat'l Gas Co., 321 S.W. 2d 596 (Tex. Civ. App. 1959, writ ref., n.r.e.), there was no language in the agreement between the parties which could be construed to permit a grantee a right under the agreement in excess of the right actually used, i.e., a right to increase the size of the pipe in excess of 18 inches in diameter.
>
> (3) Emphasizing the fact that the parties had deleted the word 'remove', the Court held that in installing the 18-inch pipe with the consent and acquiescence of the plaintiff, the extent of defendant's easement rights under their agreement became fixed and certain "De

> fendant was not authorized to remove this 18-inch line initially constructed and replace it with a line of substantially greater size.

In Winslow v. City of Vallejo, supra, an easement granting the City of Vallejo a right of way for "any water pipes or mains which may be laid by the city.", such pipes to be covered by not less than 1½ feet of ground, and to be "laid and maintained on present surveyed line as near as may be." was involved. The Supreme Court of California held in favor of the grantor-landowner and said that where a grant of an easement is general as to the extent of the burden to be imposed on the servient tenement, an exercise of the right with the acquiescense and consent of both parties in a particular court or manner, fixes the right and limits it to the particular course or manner in which it has been enjoyed. The City of Vallejo had sought to lay an additional 14-inch pipe about three feet from the 10-inch pipe originally installed. The court held that the most that could be said regarding the language of the easement was that the grant was indefinite as to the number of pipes, and that the city, having originally elected to lay one pipe, was bound by such election.

The language of the present agreement between the parties clearly demonstrates the propriety of appellee's action in substituting the single 12-inch pipe for the two 8-inch pipes. Particular attention is directed to the fact that the easements expressly provide appellee with the right to *reconstruct or remove conduits, cables and fixtures as the grantee may from time to time require.* The plural is used throughout. We believe a proper construction of the easements involved in this case warrants the placement of the 12-inch pipe between the two 8-inch pipes with a resultant replacement and non-use of the two 8-inch pipes. The inclusion of the above language demonstrates that

the parties intended that Southwestern Bell be permitted to remove or expand its use of the easements as appellee might from time to time require, at least to place the 12-inch pipe between and in lieu of the old pipes within the 30-foot area. Knox v. Pioneer Natural Gas Co., 321 S.W. 2d 596 (Tex. Civ. App), writ ref., n.r.e.; Cantu v. Central Power & Light Co., supra.

Moreover, appellant's above claims do not affect appellee's alleged right of lateral support of its easements. Until appellant advanced its abandonment theory, over five months after the trial of the case, it argued that appellee had valid prescriptive easements. Even if it be held that appellee trespassed to some extent or had improperly expanded its easements, its right to lateral and subjacent support would not be affected. Such alleged enlargement and trespass could not affect the quantity of sand and gravel that the Sand Company could excavate from the property. It is important to note that in the Dwyer case, while the Supreme Court held that the easement owner had expanded its easement rights and that the land owner would thus have condemnation rights, the Supreme Court expressly held that the easement owner's expansion did not constitute a termination of its easement rights.

Appellant contends that appellee abandoned the easements from the river to a point 197 feet into the 17.584 acre tract where the new manhole was placed in 1966, and cites the testimony of Mr. Jaenacke, appellee's Toll Engineer, to the effect that when the new line was placed, the old pipe was abandoned in place in support of its contention. The Toll Engineer obviously meant only that the old pipes, which had been laid pursuant to the easements and which were replaced by a new pipe, were left in the ground because there was no point in taking them out. This does not mean that the easements were abandoned,

especially when a new line had been laid between the old pipes at the same time. It is necessary to prove an intent to abandon in order for there to be an abandonment of an easement, and the intention must be satisfied by clear and satisfactory evidence. Dallas County v. Miller, 166 S.W. 2d 922 (Tex. Com. App.), opinion adopted; 1 Tex. Jur. 2d, Sec. 10, p. 8. Although in the present case there was clearly not a non-use of the easement, the decisions uniformly hold that mere non-user does not in itself constitute abandonment. Dallas County v. Miller, supra. The use for which appellee acquired its easements has not failed. See Griffith v. Allison, 96 S.W. 2d 74, 77 (Tex. Com. App.), opinion adopted. There was no pleading of abandonment, which is an affirmative defense, and failure to plead it results in its waiver. Rule 94, T.R.C.P.; See Chapman v. Tyler Bank & Trust Co., 396 S.W. 2d 143 (Tex. Civ. App.), writ ref., n.r.e. We hold that the issue of abandonment was not tried by express or implied consent, and that the findings and implied findings of the trial court that there was no abandonment are supported by the evidence.

By various points of error, appellant contends that appellee, while it is entitled to such rights as may be necessary and essential to reasonable enjoyment of the easements, is nevertheless not entitled to lateral and subjacent support for the easements in question, and that appellant may with impunity excavate sand and gravel from its 17.584 tract as it sees fit. Appellant stipulated that it would not, however, extract sand from beneath the easements or within the 30-foot area where the lines are located. But the evidence clearly shows that such restriction agreed to will not solve the problem, and that within a short time, if appellant pursues its plan of excavations, all lateral and subjacent support of the lines, manhole and other equipment will be lost.

The grantee of an easement is entitled to such rights as are incident, essential or necessary to the enjoyment of such easement. Williams v. Thompson, 256 S.W. 2d 399 (Tex. Sup.). An easement, however, gives no exclusive dominant right over the servient land unnecessary to the enjoyment of such easement, and the dominant owner (easement owner) must make a reasonable use of the right so as not unreasonably to interfere with the property rights of the owner of the servient estate. Magnolia Pipeline Co. v. McCarter, 52 S.W. 2d 663 (Tex. Civ. App), no writ hist.; Texas-Louisiana Power Co. v. Webster, 59 S.W. 2d 902, 905 (Tex. Civ. App.), affirmed, 91 S.W. 2d 302. As was held in Simon v. Nance, 100 S.W. 1038 (Tex. Civ. App.), no writ, the existence of the right to lateral support is an absolute right and is not subordinate to any right of the adjoining proprietor. Appellant, however, contends that rights of an adjoining proprietor differ from the rights of an easement owner as against the landowner, or the rights of the owner of the dominant estate as against those of the owner of the servient estate. We hold that the duties and obligations as between the owners of the dominant estate and the servient estate, if different, are greater and more clearly defined than the rights as between adjoining landowners, by reason of the contractual relationship of the parties under the authority and the rules of law cited above. In contrast, in the present case, there is a special relationship between appellant and appellee and the interests of land involved. The prior owners of the 17.584 acre tract encumbered, for valuable consideration, the tract of land for the benefit of appellee. The owners of the servient estate sold and guaranteed the right to use the easement for the purposes stated. Appellant is in privity with its predecessors in title, and took with actual and constructive notice of Southwestern Bell's easements. Accordingly, there is even more reason to conclude that an easement is entitled to lateral support.

Whether we say that necessary lateral and subjacent support of the easements here involved is an incident of appellee's right to the complete enjoyment of the easements, or whether lateral and subjacent support is a separate right of property makes little practical difference. All of the testimony in this case points clearly to the fact that some formula or some means was necessary to regulate the excavations and removal of sand and gravel, or appellee's telephone lines and equipment would have no support. They would, in fact, have been left suspended in the air. The State of Texas is blanketed with many thousands of easements. Although most of these are privately owned, practically all serve public purposes. The tremendous transportation and communication systems servicing the state are dependent upon the integrity of these easements. Many of the streets, roads, and highways of the state are built on easements. The distribution of electric power is dependent upon easements as is practically all telephone service. Pipelines and railroads generally rely entirely on easements. Under the view taken by appellant, these interests in land would be potentially reduced to mere licenses at will.

The problems in this case are difficult, for to grant adequate relief to appellee the appellant must suffer loss and damage, and its right to excavate valuable sand and gravel from its land must be reduced. But to our minds the equities and legal rights of the parties are clear. We hold that the owner of the dominant estate, the easement owner, is entitled to lateral and subjacent support for its easements, its lines and its property lawfully thereon, and that the trial court correctly applied the doctrine of lateral and subjacent support. Salt Lake City v. J. B. & R. E. Walker, Inc., 253 P. 2d 365 (Utah Sup.); Village of Haverstraw v. Eckerson, 118 N.Y.S. 337, aff'd., 84 N.E. 578, 20 L.R.A., N.S. 287; City of Troy v. Murray, 219 N.Y.S. 681; Cincinnati & Sub-

urban Bell Telephone Co. v. Eadler, 61 N.E. 2d 795 (Ct. App. Ohio); Scranton v. Peoples Coal Co., 100 A. 818; East Ohio Gas Co. v. James Bros. Coal Co., 85 N.E. 2d 816 (Ohio); Sumrall v. United Gas Pipe Line Co., 97 So. 2d 914 (Miss. Sup.). The Texas courts have impliedly recognized that easements are entitled to lateral support. In Calvert v. Harris County, 46 S.W. 2d 375 (Tex. Civ. App.), writ ref., a condemnation suit, the condemnees attempted to recover as a part of their damages the loss of mineral rights relating to the minerals underlying the surface of the land taken for road purposes. The court rejected condemnee's contention. In the first place, the condemnor did not acquire the minerals. "The settled rule is that in condemnation proceedings only an easement is acquired." Secondly, the oil and gas in question could be extracted by easement which was taken. The court said:

> "In Lewis, Eminent Domain, Vol. 2 (3rd Ed.) page 1268, we find this statement: 'When an easement is taken for a railroad or other public use, the owner of the fee retains title to the minerals with the right to remove them, *subject to the right of support* for the railroad or whatever may be put upon the land, and to the right of exclusive use of the surface.' See Southern Pac. R. Co. v. San Francisco Savings Union, 146 Cal. 290, 79 P. 961, 964, 70 L.R.A. 221 . . ." (Emphasis added)

Appellant, in an attempt to equate its rights with the rights of a mineral or oil and gas lessee, contends that its excavations and removal of sand and gravel from its land places it in the position of a mineral lessee or owner, and cites the case of Warran Petroleum Corp. v. Monzingo, 304 S.W. 2d 362 (Tex. Sup.) in support thereof. Appellant contends that its right to remove "minerals" was absolute, and consequently there is no duty befalling appellant to provide lateral support. The position is untenable. The leading Texas decision bearing on the meaning of the

term "minerals" as it is used in the Texas law concerning mines and minerals is Heinatz v. Allen, 217 S.W. 2d 994 (Tex. Sup.). Sand and gravel under the circumstances of this case are not minerals. Psencik v. Wessels, 205 S.W. 2d 658 (Tex. Civ. App.), writ ref.; Winsett v. Watson, 206 S.W. 2d 656 (Tex. Civ. App.), writ ref.; See 40 Tex. L. Rev. 163. Compare Street v. Sinclair Pipeline Co., 386 S.W. 2d 350 (Tex. Civ. App.), no writ hist., with Kenny v. Texas Gulf Sulphur Co., 351 S.W. 2d 612 (Tex. Civ. App.), writ ref., both decisions by the same court. The case of Cline v. Henry, 239 S.W. 2d 205 (Tex. Civ. App.), writ ref., n.r.e., cited by appellant, involving a waiver of homestead rights, is unpersuasive and is not in point.

None of appellant's due process of other constitutional rights have been violated in this case. The trial court's holding that removal or change in the type and nature of the easement rights of appellee is not feasible under the circumstances is fully supported by the evidence. Moreover, the trial court's methods of providing for lateral and subjacent support for appellee's easements outlined above is supported by the evidence, and the trial court's remedy was the only solution developed by the testimony. Appellant's defense was principally that no lateral support was required. Under the difficult and complex circumstances, the trial court's remedy was reasonable and necessary to protect appellee's easement rights. The trial court provided for supplemental relief on application of the parties to relieve inequities and hardships which might develop in the future, and we believe the judgment is in all things correct.

We have carefully reviewed each contention made by appellant, and finding no error in the trial court's judgment, it is affirmed.

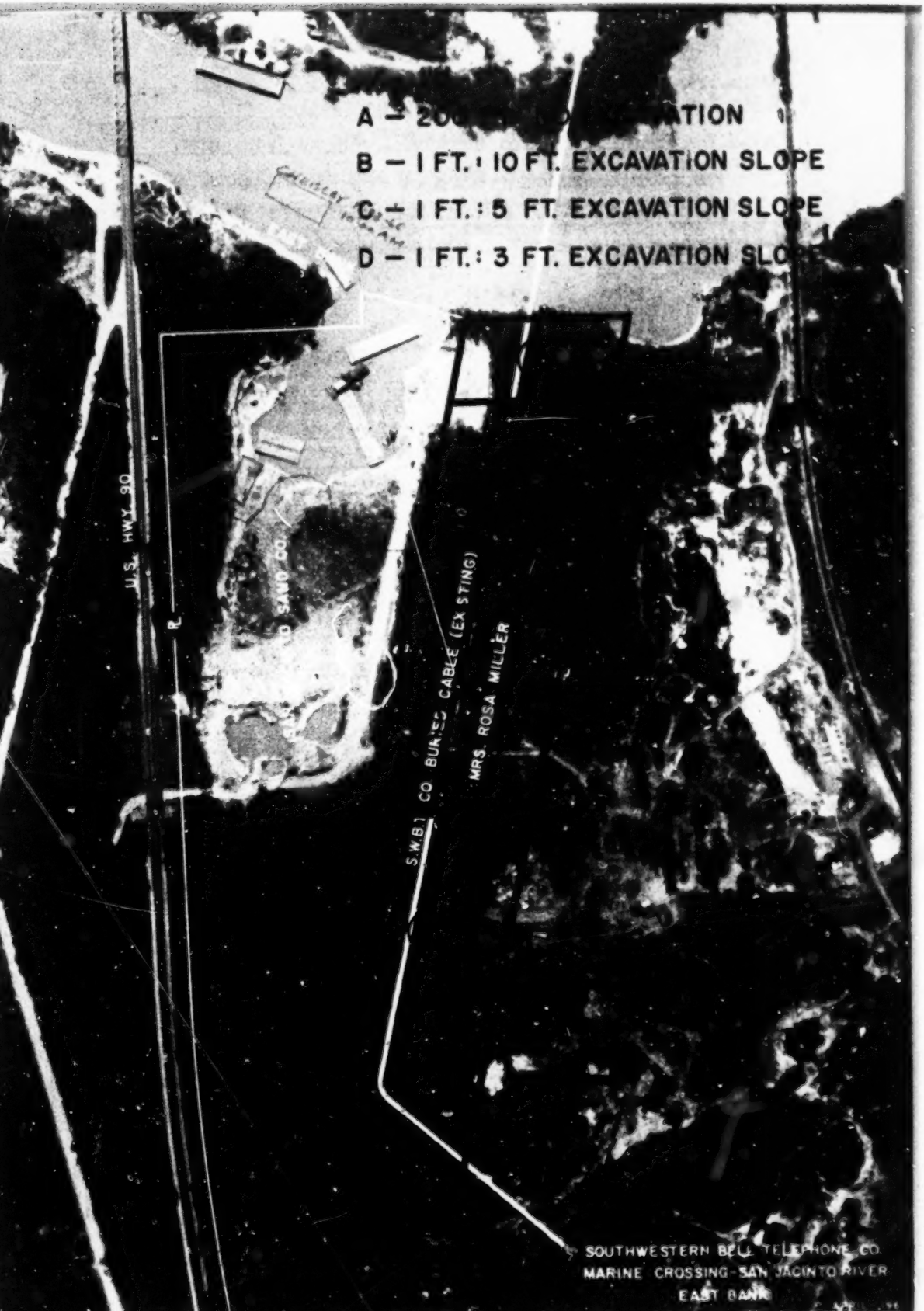
/s/ John M. Barron
Associate Justice

Judgment rendered, and opinion filed March 6, 1968.

APPENDIX B

DATA PERTAINING TO LOCATION, SIZE AND VALUE OF 314,370 cu. yds. OF SAND AND GRAVEL TAKEN FROM PETITIONER WITHOUT THE PAYMENT OF COMPENSATION

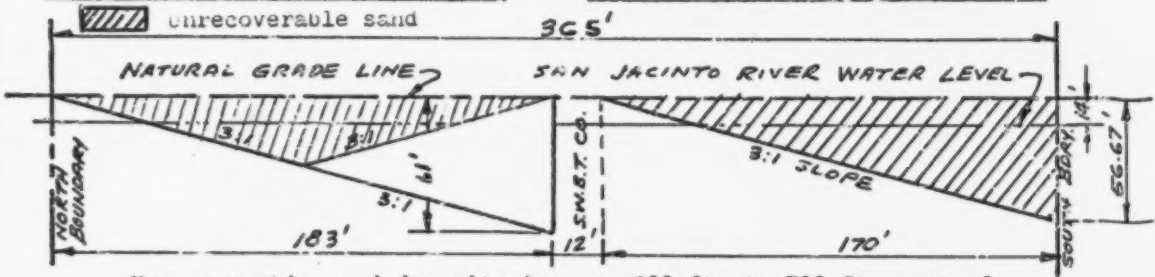
		Page No.
1.	Picture of 17,584 acre tract with notations as to areas taken from the petitioner	1
2.	Sketch of areas containing sand and gravel taken from the petitioner	2
3.	Computation of value of 314,370 cu. yds. of sand and gravel taken without the payment of compensation	3
4.	Survey showing the 17.584 acre tract	4


A – 20 [illegible] ATION
B – 1 FT. : 10 FT. EXCAVATION SLOPE
C – 1 FT. : 5 FT. EXCAVATION SLOPE
D – 1 FT. : 3 FT. EXCAVATION SLO
U.S. HWY. 90
SAND BOX
S.W.B.T. CO. BURIED CABLE (EX STING)
MRS. ROSA MILLER
SOUTHWESTERN BELL TELEPHONE CO.
MARINE CROSSING - SAN JACINTO RIVER
EAST BANK

Unrecoverable sand deposits in area 200 ft. east of east bank of the San Jacinto River as result of imposition of:

200 ft. no excavation requirement
20,070 cu. yds. lost

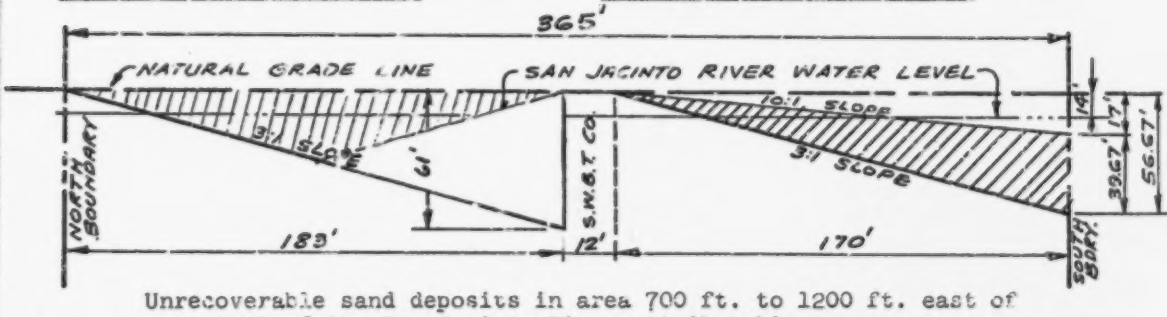
200 ft. no excavation requirement
35,080 cu. yds. lost



Unrecoverable sand deposits in area 200 ft. to 700 ft. east of the east bank of the San Jacinto River attributable to:

denial of access by dredge
51,680 cu. yds. lost

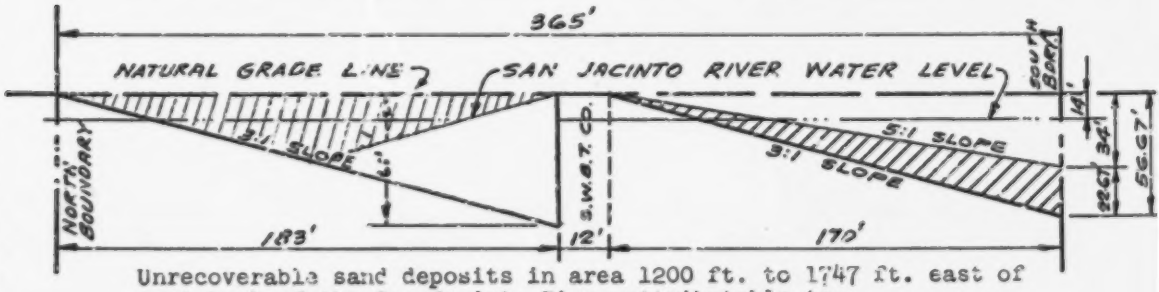
1 to 10 slope requirement
62,440 cu. yds. lost



Unrecoverable sand deposits in area 700 ft. to 1200 ft. east of east bank of the San Jacinto River attributable to:

denial of access by dredge
51,080 cu. yds. lost

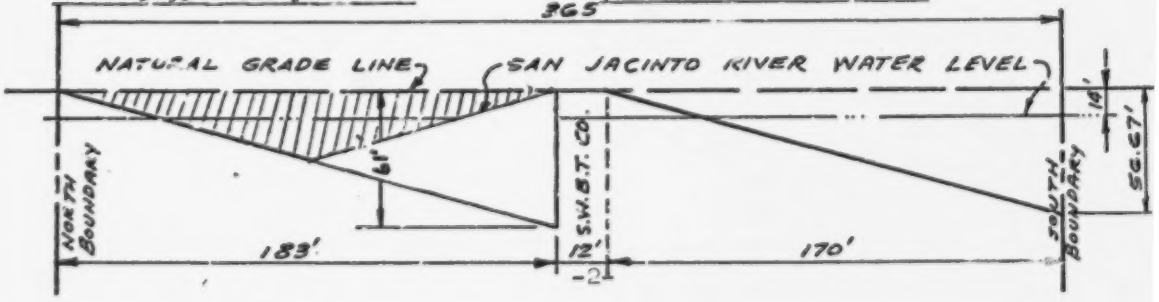
1 to 5 slope requirement
35,080 cu. yds. lost



Unrecoverable sand deposits in area 1200 ft. to 1747 ft. east of east bank of the San Jacinto River attributable to:

denial of access by dredge
50,540 cu. yds. lost

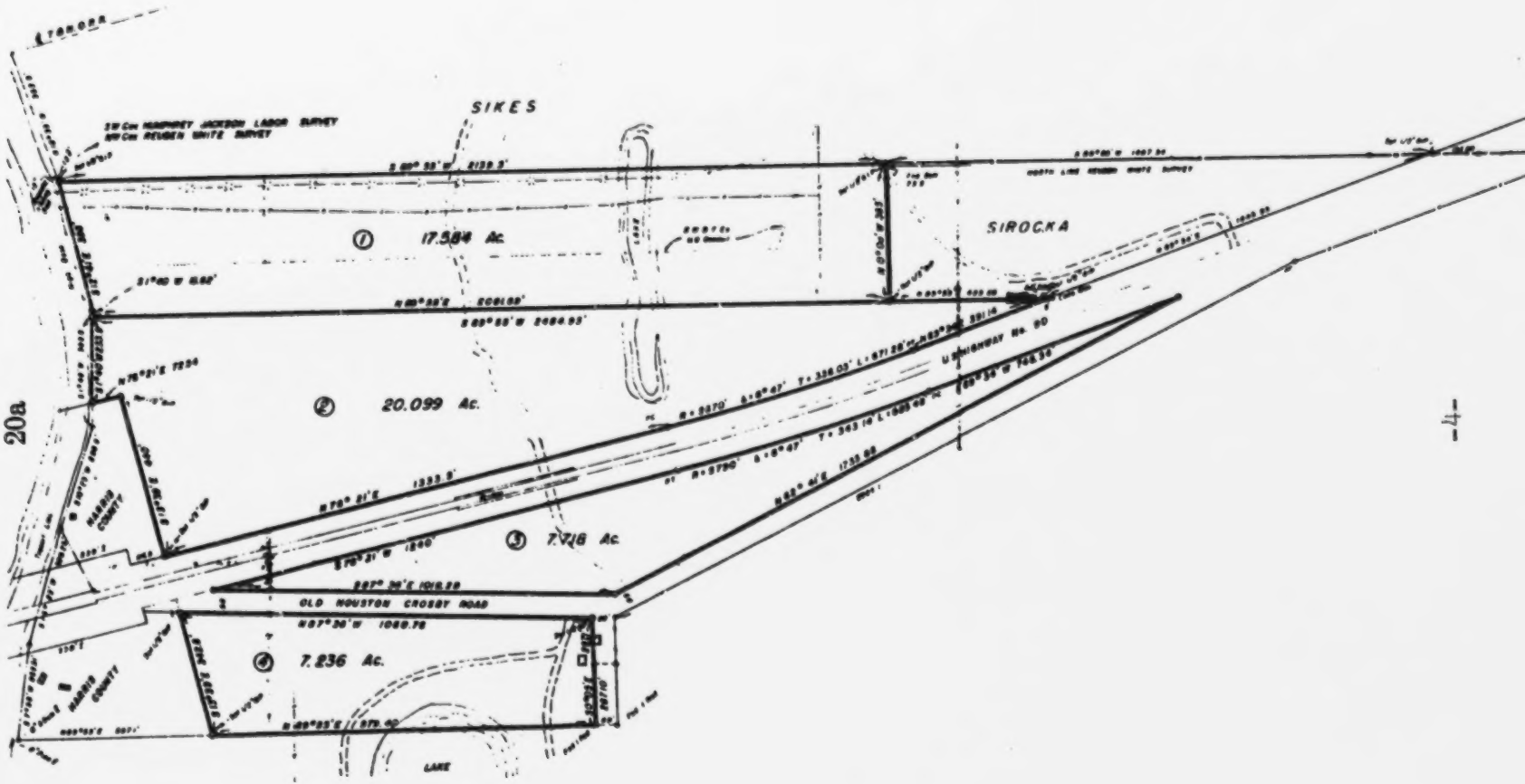
1 to 3 slope requirement



APPENDIX B

COMPUTATION OF VALUE OF SAND TAKEN FROM PETITIONER WITHOUT COMPENSATION

Area in which sand and gravel taken	Yardage taken	Value of sand taken	
		Retail Price $1.35 yd.*	Royalty Price 15¢ yd.
		$	$
Area north of easements:			
0 ft. - 200 ft. east of river	20,670	27,904	3,101
200 ft. - 700 ft. east of river	51,680	69,768	7,752
700 ft. - 1200 ft. east of river	51,680	69,768	7,752
1200 ft. - 1747 ft. east of river	56,540	76,329	8,481
Area south of easements:			
0 ft. - 200 ft. east of river	35,680	48,168	5,352
200 ft. - 700 ft. east of river	62,440	84,294	9,366
700 ft. - 1200 ft. east of river	35,680	48,168	5,352
		424,399	47,156


SIKES
SIROCKA
17.584 Ac.
20.099 Ac.
7.218 Ac.
7.236 Ac.
OLD HOUSTON CROSBY ROAD
HARRIS COUNTY
LAKE
U.S. HIGHWAY No. 90

20a

APPENDIX C

SUMMARY OF THE GROUND FOR NEW TRIAL AND ASSIGNMENTS OF ERROR IN WHICH CONSTITUTIONAL ISSUES WERE RAISED

1. Motion for New Trial filed May 26, 1967.

Ground 20:

> *"TWENTIETH:* The judgment is contrary to law in that the prohibition of excavations in the 200 foot strip of the 17.584 acre tract located east of the east bank of the San Jacinto River and north and south of the respective southern and northern boundaries of the 17.584 acre tract constitutes an unconstitutional taking of property without due process of the law. The evidence clearly reveals that if the residual slopes recommended by Mr. Van Sickle were established in the 200 foot strip the easements would have their proper support. The Plaintiff as holder of the easement has the obligation to maintain any such slopes in operating condition. *West* v. *Giesen; Cozby* v. *Armstrong, supra.* If the Plaintiff desires to subject to its control portions of the Defendants' land not subject to its easements, the Plaintiff as a public utility can do so through appropriately instituted condemnation proceedings, in which the Defendants' interests will be protected by due process."

2. Brief on Appeal filed with the Court of Civil Appeals in the appeal from the 157th District Court of Harris County, Texas.

Point of Error Eight and Eighth Point of Error Restated, pp. 5, 15:

> "The trial court, as a matter of law, unconstitutionally deprived appellant of its property when it enjoined appellant's excavation of said from the 197

foot strip of land paralleling the San Jacinto River. (Germane to Point 20, Motion for New Trial)."

The assignment of error was discussed at pages 45-52 of the Brief on Appeal.

3. Application for Writ of Error filed in the Supreme Court of Texas on May 8, 1968.

Points of Error Nos. 7 and 17 state the constitutional questions at pages 9 and 12 of the Application for Writ of Error.

POINT OF ERROR NO. 7

"The Court of Appeals erred in failing to determine that there had been an unconstitutional taking of the petitioner's land without due process by the imposition of excessive standards of lateral support. (Germane to Points 11, 12, 13, 20, Motion for New Trial; Points 17, 18, Motion for Rehearing.)"

POINT OF ERROR NO. 17

"The Court of Appeals erred in failing to determine that there had been an unconstitutional taking of the petitioner's land without due process by the imposition of excessive standards of lateral support. (Germane to Points 11, 12, 13, 20, Motion for New Trial; Points 17, 18, Motion for Rehearing.)

Point of Error No. 7 was discussed in detail at pp. 36-40 of the Application for Writ of Error. Point of Error No. 17 was encompassed in a discussion of the adverse effects of the respondent's taking of the petitioner's land, but was not separately discussed.

4. First Amendment to Application for Writ of Error accepted by the Supreme Court of Texas on July 24, 1968.

Points of Error Nos. 7 and 17 (after amendment) were set forth at pages 1 and 2:

POINT OF ERROR NO. 7 (AFTER AMENDMENT)

"The Court of Appeals erred in failing to determine that there had been an unconstitutional taking of the petitioner's land *without compensation and* without due process of law by the imposition of excessive standards of lateral support, *such taking of the petitioner's land being prohibited by the provisions of Article I. Section 17 of the Constitution of the State of Texas and by Section 1 of the Fourteenth Amendment to the Constitution of the United States.* (Germane to Points 11, 12, 13, 20 Motion for New Trial; Points 17, 18 Motion for Rehearing)"

POINT OF ERROR NO. 17 (AFTER AMENDMENT)

"The Court of Appeals erred in failing to determine that there had been an unconstitutional taking of the petitioner's land *without compensation and* without due process of law by the imposition of excessive standards of lateral support, *such taking of the petitioner's land being prohibited by the provisions of Article I, Section 17 of the Constitution of the State of Texas and by Section 1 of the Fourteenth Amendment to the Constitution of the* United States. (Germane to Points 11, 12, 13, 20, Motion for New Trial; Points 17, 18, Motion for Rehearing) new material underlined."